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13
14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**

16 _____x
FIFTY-SIX HOPE ROAD MUSIC, LTD., et al.

17 Plaintiffs,

CV-S-05-1059-KJD-GWF

18 v.

19 MAYAH COLLECTIONS, INC., et al.,

20 Defendants.
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23 **DEFENDANT'S MOTION TO COMPEL**

24 Defendant, The Tunes Company ("Defendant") hereby files this Motion to Compel
25 discovery responses, without objection from Plaintiffs Fifty-Six Hope Road Music, Ltd. ("Hope
26 Road") Zion Rootswear, LLC ("Zion") (collectively "Plaintiffs") and Counterclaim Defendant,
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1 Miles Davis Properties, LLC (“MDP”).¹ Defendant further seeks and Order of Preclusion for all
2 documents improperly withheld by Plaintiffs.

3 On September 19, 2006 Defendant served a First Request for Production of Documents
4 and First Set of Interrogatories on the Plaintiffs and MDP.² Without requesting leave of Court or
5 obtaining consent from Defendant, Plaintiffs Hope Road and Zion delayed until December 22,
6 2006 to first serve their objections and responses. Counterclaim Defendant MDP, to date, has
7 not served any responses or objections. Pursuant to Fed. R. Civ. P. 33(b)(4) and 34(b), Plaintiffs
8 and MDP have waived all objections. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d
9 1468, 1473 (9th Cir. 1992); *Escalante v. City of Delano*, 2006 U.S. Dist. LEXIS 33656 (E.D.
10 Cal. 2006). After delaying three months, Plaintiffs Hope Road and Zion served a laundry list of
11 improper objections and very limited document production, which by their own admission only
12 contained documents they believed were “pertinent” to this lawsuit. Following an exchange of
13 communications between counsel, Hope Road and Zion supplemented their responses and
14 production. For the reasons set forth below, Plaintiffs’ discovery responses remain deficient, and
15 with the close of discovery only a month away Defendant has been severely prejudiced by
16 Plaintiffs’ continued failure to meet their discovery obligations. Defendant respectfully moves
17 the Court for an Order precluding at trial use of any responsive materials not already produced
18 by Plaintiffs and for an Order compelling complete production, without objection, of all
19 materials and information responsive to Plaintiffs’ Requests.
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26 ¹ Plaintiffs filed a motion for leave to amend the Complaint in which Plaintiff Miles Davis has dropped its claims in
27 this action. The counterclaims against Miles Davis, however, survive, and Defendant (counterclaim Plaintiff) is
28 entitled to full responses without objections to their timely served requests.

² A copy of Defendant’s Requests to MDP, as well as Plaintiffs’ Responses and Supplemental Responses are attached
hereto as Exhibits A-I. Because Defendant’s instructions and definitions were virtually identical for the requests
propounded on all three parties, and because Defendant’s document requests and Interrogatories to Plaintiffs Hope
Road and Zion were incorporated verbatim into Plaintiffs’ Responses, Defendant has not attached what would be a
duplicative copy of the requests to Hope Road and Zion. These requests are available should the Court so desire.

A. Plaintiffs Have Waived All Objections Under Rules 33(b)(4) and 34(b)

On September 19, 2006 Defendant served a First Request for Production of Documents and First Set of Interrogatories on the Plaintiffs and MDP. Plaintiffs' and MDP's responses and objections were due on or before October 23, 2006. On November 3, 2006, two weeks after their responses were due, the undersigned counsel contacted counsel for Plaintiffs and MDP to inquire as to the status of the outstanding discovery, and to place Plaintiffs and MDP on notice that their objections have been waived. In response, Plaintiffs' and MDP's counsel, for the first time, indicated that over six weeks earlier, on September 17, 2006, before Defendant even served its discovery requests, one of the principals, Michael Conley, of one of the Plaintiffs, Zion Rootswear, had been injured and was currently only working part time. While Defendants are certainly sympathetic to the fact that Mr. Conley may have been previously unable to participate in responding to Defendant's discovery demands, Plaintiffs and MDP, to date, have offered no explanation as to why this injury prevented both Plaintiffs and MDP and counsel, from meeting their discovery obligations. In particular, there is no justification for:

- (1) Plaintiffs' and MDP's counsel's failure to timely serve objections;
- (2) Plaintiffs' and MDP's counsel's failure to timely seek an extension of time from the Court for Plaintiff Zion Rootswear and/or Plaintiffs Fifty Six Hope Road and MDP to respond;
- (3) Plaintiffs' and MDP's counsel's failure to timely notify Defendant's counsel that additional time was needed to respond to discovery – instead waiting for Defendant's counsel to first raise the issue weeks after the discovery was due;
- (4) Other individuals at Zion Rootswear's failure to assist counsel with its discovery obligations – particularly in light of the fact that Plaintiffs filed this suit over a year ago, and this is one of dozens of lawsuits filed by Plaintiffs involving this same intellectual property; and

1 (5) The two separate and distinct parties, Fifty Six Hope Road's and MDP's failure to
2 timely respond to the separate discovery requests they had been served with.

3 Following receipt of Defendant's letter demanding immediate production, Plaintiffs and
4 MDP indicated that the three parties would be serving their discovery responses on or before
5 December 1, 2006. However, no responses were served on or before December 1, 2006, but
6 instead without leave of Court, Plaintiffs Hope Road and Zion first served their objections and
7 responses to Defendant's September 19, 2006 requests on December 22, 2006. Counterclaim
8 Defendant MDP has yet to serve any responses, and is apparently no longer participating in this
9 litigation. *See*, D.E. 74, in which MDP has dropped its claims in this lawsuit. Plaintiffs and
10 MDP have not obtained consent from Defendant for an extension of time for their self-prescribed
11 December 1, 2006 deadline or from the deadline set by Federal Rules 33 and 34. Plaintiffs have
12 likewise failed to timely seek this relief from the Court. In an effort to resolve this matter
13 without Court intervention, Defendant's counsel has engaged Plaintiffs' and MDP's counsel in
14 an exhausted exchange of emails, letters and phone calls, but to date there remains essential
15 information and documents that Plaintiffs and MDP, without any justification, refuse to disclose.
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17 Defendant has been, and will continue to be, prejudiced by Plaintiffs' and MDP's failure
18 to timely meet their discovery obligations. Because of the rapidly approaching Court-ordered
19 deadlines, and certain deadlines which have already expired, including the deadline to amend the
20 pleadings and add additional parties on January 28, 2007 as well as the close of fact discovery on
21 March 30, 2007, Defendant is entitled to an Order of preclusion and an Order compelling
22 immediate production under the enforceable powers of this Court and Rule 37.
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24 It should not go unnoticed that during the time when Plaintiffs and MDP were allegedly
25 unable to meet their discovery obligations, from September 17, 2006 through December 22,
26 2006, Plaintiffs conveniently had no difficulty actively participating in other aspects of this
27 litigation by making numerous filings and appearances to forward their own case. For example,
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1 on October 10, 2006, Plaintiffs filed, without leave of Court, an Amended Complaint. [D.E. 64 –
2 stricken from the Record]. On October 27, 2006, Plaintiffs filed a motion for sanctions (against
3 a different Defendant), and appeared at a hearing on their motion for sanctions on November 28,
4 2006. [D.E. 63 and 71].

5 For the foregoing reasons, Defendant respectfully requests that the Court compel
6 Plaintiffs and MDP to immediately respond to all of Defendant's discovery requests and produce
7 responsive documents and information without objection.
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10 **B. Counterclaim Defendant MDP Should Be Compelled to Respond**

11 On September 19, 2006 Defendant served a First Request for Production of Documents
12 and First Set of Interrogatories on Counterclaim Defendant MDP. Without requesting leave of
13 Court or obtaining consent from Defendant, Counterclaim Defendant MDP, to date, has not
14 served any responses or objections. Pursuant to Fed. R. Civ. P. 33(b)(4) and 34(b), MDP has
15 waived all objections. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th
16 Cir. 1992); *Escalante v. City of Delano*, 2006 U.S. Dist. LEXIS 33656 (E.D. Cal. 2006).
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18 Counterclaim Defendant MDP is apparently no longer participating in this litigation, as
19 Plaintiffs have moved to amend their complaint and drop all claims asserted by MDP. *See*, D.E.
20 74, in which MDP has dropped its claims in this lawsuit. Nonetheless, MDP is still named as a
21 Counterclaim Defendant in this action and has failed to comply with its discovery obligations.
22 Defendant therefore requests that the Court Order MDP to immediately and fully respond to
23 Defendant's discovery requests, without objection. Defendant further requests that the Court
24 enter an Order precluding MDP's use of all withheld documents at trial.
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1 **C. Plaintiffs Hope Road and Zion’s Discovery Responses are Deficient**

2 As the Court is aware, this lawsuit was initiated when Plaintiffs on an *ex parte* basis
3 moved the Court for an Order of Seizure and a temporary restraining order. In doing so,
4 Plaintiffs have alleged to be the exclusive owners of far-reaching intellectual property rights
5 related to all aspects of the trademarks and names, images, likeness, signatures and other indicia
6 related to BOB MARLEY and MILES DAVIS.
7

8 Defendant has properly and timely served discovery requests seeking evidence that may
9 be relied on by Plaintiffs to support the alleged ownership and use of such rights and materials
10 that support Plaintiffs’ claims for damages, and Defendant’s affirmative defenses and
11 counterclaims. As a result of Plaintiffs’ reliance on untimely served and improper objections,
12 Defendant has been denied access to the very cornerstone documents Defendant is entitled to
13 defend a lawsuit of this nature. In response, Plaintiffs have untimely produced what appears to
14 be an indiscriminate and very limited selection of only some of the materials they believe are
15 relevant. In refusing full disclosure of responsive materials, Plaintiffs have stated that the burden
16 and expense of producing the requested materials “outweighs the likely benefit given the limited
17 scope of the issues in this matter, namely a single t-shirt design sold by the Defendants.
18 Plaintiffs have offered no explanation as to why production of documents in their possession
19 custody and control would create any burden at all, and certainly have failed to demonstrate that
20 these documents are not relevant or likely to lead to relevant information – the proper standard
21 under Rules 26, 33 and 34. Moreover, after deciding to initiate the litigation, Plaintiffs cannot
22 now claim they no longer want to bear the burden inherent in a federal lawsuit of this nature.
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25 Plaintiffs cannot have it both ways. Plaintiffs cannot claim all-inclusive rights to BOB
26 MARLEY and MILES DAVIS, seek a broad-based injunction, and then withhold documents and
27 information during discovery that is directly related to these rights simply because they now
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1 believe it is advantageous to limit this case to “one t-shirt design.”³ Plaintiffs have asserted very
2 serious allegations against Defendant, and seek to greatly restrict and impair Defendant’s
3 business and its employees’ livelihood. Defendant is entitled to the relevant information needed
4 to defend these claims.

5 In addition to failing to produce responsive information and materials, Plaintiffs have
6 also failed to meet their discovery obligations by asserting a lengthy list of untimely served
7 objections to almost all of Defendant’s discovery requests. Although Plaintiffs, in some
8 instances, have supplemented their responses it remains unclear whether Plaintiffs are relying on
9 their objections to withhold additional responsive information, or whether no documents (or
10 additional documents) exist. Defendant has asked Plaintiffs to clarify this question for the
11 following requests – for which there has been no response: 20, 27, 32, 34, 36, 39-42, 48, 53, 64,
12 82, 98, 111, 112-117, 120 and 130.
13

14 Defendant seeks an Order compelling a response as to whether Plaintiffs continue to rely
15 on objections to the above-identified list of Document Requests, or whether all documents
16 responsive to the above-identified requests have been produced. Without such an Order,
17 Plaintiffs will be reserving their right to “sand-bag” Defendant with responsive documents
18 withheld during discovery and suddenly produced at trial. Moreover, because Plaintiffs have
19 failed to indicate whether there are indeed additional responsive documents, Defendant cannot
20 determine whether it is entitled to the withheld documents.
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27 ³ Defendant has offered to limit its discovery requests in accordance with Plaintiffs’ characterization of this lawsuit,
28 provided Plaintiffs were willing to stipulate that this case is in fact limited to Defendant’s use of the asserted rights
solely in connection with a single t-shirt design, and that Plaintiffs will not seek to rely on any rights acquired
through use of the intellectual property in connection with other goods or services. Plaintiffs have not responded to
this proposal.

1 **1. Plaintiffs' Interrogatory Responses Remain Deficient**

2 Defendant served Interrogatory No. 10 on both Plaintiff Hope Road and Zion requesting
3 disclosure of their respective dates of first use of the asserted trademark. In response, Plaintiffs
4 directed Defendant to Plaintiff Hope Road's trademark application in which Hope Road alleges
5 that the mark has been used in commerce in connection with certain goods since "at least as early
6 as 1990." This response is deficient for two reasons. First, Defendant is entitled to disclosure of
7 Hope Road's actual first use date – and should not have to guess as to whether Plaintiffs will
8 seek to rely on a priority date before 1990. Second, Defendant is entitled to a response from both
9 Plaintiff Hope Road and Zion as to each Plaintiffs' respective first use date.

11 Defendant's Interrogatory No. 11 requested information as to the number of sales of
12 goods and services sold by Plaintiffs (or Plaintiffs' licensees) since the date of first use.
13 Plaintiffs relying on their untimely served objections have refused to respond to this request
14 except to produce information pertaining solely to t-shirts and solely for the past three years.
15 This response is deficient for at least two reasons. First, Plaintiffs have not limited their rights to
16 the asserted intellectual property solely to t-shirts. Because Plaintiffs' are relying on the rights
17 they have acquired through use of the mark in connection with goods other than t-shirts, and are
18 seeking to enjoin Defendant's use of the mark on goods other than t-shirts, Plaintiffs, therefore,
19 cannot limit their response to just t-shirts.

21 Second, because Plaintiffs have alleged that they have used the mark in commerce since
22 at least as early as 1990, Defendant is entitled to information, including the amount of sales, that
23 Plaintiffs made during these years. If, for example, Plaintiffs made no sales of goods in
24 connection with the mark during the years 1992-1995, this would clearly be relevant to
25 Defendant's abandonment affirmative defense. The parties have entered into a stipulated
26 protective order protecting the proprietary nature of this information, and there is no justification
27 for Plaintiffs' failure to produce this responsive and relevant information.
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2 **2. Plaintiffs' Document Production is Deficient**

3 a. Plaintiffs' Have Produced no Correspondence Related to The Alleged
4 Trademark or Other Asserted Intellectual Property Rights

5 Despite the fact that Plaintiffs claim to have been using the mark and other intellectual
6 property rights at issue in this lawsuit for over 15 years, and have licensed such rights between
7 themselves and to dozens of other parties, Plaintiffs have failed to produce a single piece of
8 correspondence between or among the parties related to this lawsuit.⁴ Not one email, letter or
9 facsimile among and between employees and representatives of Plaintiff Hope Road has been
10 produced. Not a single correspondence between and among the employees of Plaintiff Zion has
11 been produced. Not a single correspondence between Plaintiffs Hope Road and Zion has been
12 produced. Not a single correspondence between Hope Road or Zion and one of their licensees
13 has been produced. It is simply not credible that these two parties have been asserting,
14 marketing, using and enforcing the alleged intellectual property rights for the past 15+ years, yet
15 have not generated a single correspondence related to these rights. This information is
16 responsive to, at least Defendant's Request Nos. 82, 104, 105 and 128, to which Plaintiffs simply
17 objected stating the request was overly broad, unduly burdensome and irrelevant.

18 In addition to requesting all such correspondence from Plaintiffs, Defendant reminded
19 Plaintiffs of their obligations as codified in the new "e-discovery" amendments to the Federal
20 Rules. Defendant has inquired as to the methods used to search and gather electronic documents,
21 including what email accounts have been searched, what search terms were employed etc.
22 Plaintiffs refused to respond to these inquiries.
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⁴ The one exception is that Plaintiffs have produced some (Plaintiffs have not clarified if all have been produced) cease and desist letters generated by, or received by, Plaintiffs' counsel. None of these letters, however, appear to have been generated or received by the parties themselves. It seems likely that the parties have not even searched their correspondence files, emails etc, for responsive documents.

b. Specific Document Deficiencies⁵

i. Request No. 13 – Defendant has requested documents which evidence any web site on the internet where goods or services in connection with the alleged trademark are being made available. Plaintiffs responded by listing a sample of such websites, but claiming that there are numerous other sites that advertise and promote licensed products, but that these are not in the possession, custody or control of the Responding Party. Defendant is entitled to all documents related to these websites that are in Plaintiffs’ possession, custody and control. If these are licensees of Plaintiffs, it seems likely that Plaintiffs would have some relevant documents related to the use of their intellectual property by these licensees. Plaintiffs cannot avoid their obligation of producing all documents in their possession simply by identifying other documents not in their possession.

ii. Request Nos. 27 and 32 – Defendant has requested all documents related to how Plaintiffs have marketed and advertised their trademark. Plaintiffs responded with a list of objections, and supplemented their response by stating that all documents related to advertisement of the mark for t-shirts has been produced. As discussed above, this case is not solely about use of the mark on t-shirts. If Plaintiffs are unwilling to limit their rights in the mark to simply t-shirts, Defendant should not have to limit its requests for supporting evidence only to t-shirts. Plaintiffs are seeking to enjoin Defendant’s use of the mark on goods other than t-shirts. Defendant is therefore entitled to information and any evidence that demonstrates

⁵ The document requests served on Hope Road and Zion were nearly identical. All of the Document request numbers identified in this motion pertain to the requests served on Hope Road. These numbers also pertain to the requests served on Zion, with the following exception: Request Nos. 111-117, 120, 122 and 128 noted above refer not only to those numbers in Defendant’s Request to Hope Road, but also to Request Nos. 113-119, 122, 124 and 130, respectively, in Defendant’s Request to Zion.

1 Plaintiffs use of the alleged trademark in connection with any goods for which Plaintiffs are
2 asserting they have rights.

3
4 iii. Request Nos. 39 and 40 – Defendant has requested all licenses, assignments and
5 agreements related to the asserted trademark. Plaintiff has responded by producing some, but not
6 all such agreements. Plaintiffs should be precluded from relying on any agreement not already
7 produced. Plaintiffs should also be compelled to produce all licenses and assignments related to
8 the alleged mark. Plaintiffs should not be allowed to choose which agreements pertaining to the
9 intellectual property at issue in this lawsuit should and should not be produced. This information
10 is relevant to, at minimum, ownership of the alleged intellectual property, Plaintiffs’ standing to
11 assert the alleged claims, as well as evidence as to how the disputed intellectual property is being
12 used by Plaintiffs and their licensees.

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15 iv. Request No. 41 – Defendant has requested production of all settlement
16 agreements and co-existence agreements related to the asserted trademark. Plaintiffs, apparently
17 relying on untimely served boilerplate objections, and their efforts to limit this case solely to t-
18 shirts, have produced no responsive documents. These documents are relevant, or likely to lead
19 to relevant information, insofar as they will show other uses of the mark and may show certain
20 agreed-upon limitations of Plaintiffs’ rights and exclusivity in the asserted intellectual property.

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23 v. Request No. 64 – Defendant has requested documents related to Plaintiffs’
24 incorporation and legal organization. Plaintiffs have produced only eight pages of documents,
25 six of which are the public corporate filings for only one year with the Secretary of State of
26 Florida for Plaintiff Zion, and a non-party called Hope Road Merchandising, LLC, and two
27 additional pages appear to be a single two-page filing made by Plaintiff Hope Road in the
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1 Commonwealth of the Bahamas. No corporate books or other incorporation documents have
2 been produced. These documents will likely show, not only the corporate structure and
3 relationship, if any, between the parties, but also reveal the names of individuals likely to have
4 discoverable information.

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6 vi. Request No. 48 – seeks documents that evidence Plaintiffs’ attendance at each trade
7 show where the alleged trademark has been displayed, advertised or promoted by Plaintiffs.
8 Plaintiffs have objected to and refused to produce all documents responsive to this request.
9 How, when and where Plaintiffs advertise and promote the alleged trademark is certainly
10 relevant to Plaintiffs’ asserted rights in the trademarks, Plaintiffs’ channels of trade and their
11 claim of a likelihood of confusion between Defendant’s sale of their artwork and Plaintiffs’ sales
12 of their goods.
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15 vii. Request No. 111 – seeks all documents related to the creation and/or design of any t-
16 shirts sold by Plaintiffs bearing the alleged trademark. Plaintiffs objected to this request and
17 supplemented their response by directing Defendant to Plaintiffs’ Statement of Use filed with the
18 United States Patent and Trademark Office. If Plaintiffs have files related to their creation and
19 design of products which they allege are confusingly similar to the products sold by Defendant,
20 then Defendant should be allowed to inspect same. Plaintiffs cannot limit their production solely
21 to the materials filed with the United States Patent and Trademark Office, if in fact they have
22 additional responsive documents in their custody, possession or control.
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26 viii. Request Nos. 112-117 - seeks documents related to how Plaintiffs’ market, package,
27 and advertise the goods they sell in connection with the alleged trademark. These documents are
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1 highly relevant. There is no justification for Plaintiffs' failure to produce for inspection all
2 relevant documents in their possession custody or control.

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4 ix. Request No. 120 – seeks all documents pertaining to revenues and profits for the
5 sale of goods bearing the alleged trademarks. This request goes not only to Plaintiffs' asserted
6 rights in the alleged trademark and the relevant likelihood of confusion analysis, but also
7 Plaintiffs' claim for damages.
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10 x. Request No. 122 – seeks documents related to Plaintiffs' customers. Plaintiffs have
11 produced no responsive documents. Information pertaining to Plaintiffs' customers is relevant to
12 many of the likelihood of confusion factors, including, Plaintiffs' use of the mark, and channels
13 of trade. The stipulated protective order executed by the Parties protects any proprietary
14 information related to this request.
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18 **D. Conclusion**

19 For the reasons stated above, Defendant respectfully moves the Court for an Order
20 compelling immediate and complete responses, without objection, from Plaintiffs and MDP to
21 all requests served by Defendant. Defendant further requests an Order of Preclusion for those
22 documents withheld by Plaintiffs and MDP.

23 Pursuant to D. Nev. L.R. 26-7(B), the undersigned counsel hereby certifies that despite a
24 good faith effort to resolve the above dispute with counsel for Plaintiffs, through phone
25 conferences, as well as an exchange of emails and numerous letters, counsel were unable to
26 resolve this dispute.
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1 DATED: February 27, 2007.

2 Respectfully Submitted,

3 By: /s/ /Jeffrey A. Lindenbaum/

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23 *Attorneys for Defendant*

24 *The Tunes Company*

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I certify that I on this 27th day of February 2007, I caused the documents entitled Defendant's Motion to Compel to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed Envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ Pursuant to Fed. R. Civ. P. 5(b)(2)(D), to be sent via facsimile; and/or

☐ to be hand-delivered

☒ by the U.S. District Court's e-filing System:

to the attorneys listed below at the address below:

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Dated this 27th day of February, 2007.

/s/ /Jeffrey A. Lindenbaum/

Jeffrey A. Lindenbaum